

FILE COPY

SEP 15 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 91

*Petition
not printed*

ALBERT LEE,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

BRIEF FOR PETITIONER

FORREST B. JACKSON,
Counsel for Petitioner.

INDEX

	Page
Former opinions	1
Jurisdictional Grounds	2
Statement of the case	4
Assignment of errors	10
Brief and argument	13

POINT I

Under the facts disclosed in the transcript of record, the admission in evidence of the alleged confession as evidence of the petitioner's guilt in order to obtain a conviction in the trial court amounted to a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution

13

A. *The Supreme Court of the United States is not precluded by the verdict of the jury or the decision of the highest State court from determining whether a confession, used as evidence of the accused's guilt, was obtained under such circumstances of coercion and duress as to make its use in evidence a denial of due process of law*

13

AUTHORITIES

<i>Ashcraft v. State of Tennessee</i> , 322 U. S. 143, 88 L. Ed. 1192, 64 Sup. Ct. 921	16, 20, 24
<i>Brown v. State of Mississippi</i> , 297 U. S. 278, 80 L. Ed. 682, 56 Sup. Ct. 461	14, 21
<i>Chambers v. State of Florida</i> , 309 U. S. 227, 84 L. Ed. 716, 60 Sup. Ct. 472	16, 23
<i>Lisenba v. State of California</i> , 314 U. S. 219, 86 L. Ed. 166, 62 Sup. Ct. 280	14, 19
<i>Malinski v. State of New York</i> , 324 U. S. 401, 89 L. Ed. 1029	16, 25

Jurisdictional Grounds

The petitioner, Albert Lee, a negro boy seventeen years of age, was indicted by the Grand Jury of the First Judicial District of Hinds County, Mississippi on a charge of assault with intent to rape a female of previous chaste character under Section 2361, Mississippi Code of 1942. The petitioner entered a plea of not guilty and a trial was had at the regular November, 1945 Criminal Term of the Circuit Court in and for the First Judicial District of Hinds County, Mississippi.

During the course of the trial, the State offered in evidence an alleged confession obtained from the petitioner by J. R. McLeod and Captain Frank Rogers, both of whom were detectives in the Police Department of the City of Jackson, Mississippi. The petitioner objected to their testifying as to the alleged confession, contending that the alleged confession was obtained as a result of duress, threats and violence inflicted upon the petitioner by police officers during the morning preceding the afternoon that the alleged confession was obtained. At this point, the jury retired from the court room and a preliminary hearing was had as to whether the alleged confession had been voluntarily made. The court, after hearing the evidence of the two aforementioned detectives, the city jailer and the petitioner, ruled that the confession was admissible, and it was introduced as evidence of the petitioner's guilt in order to obtain a conviction.

At the conclusion of the State's evidence in chief, the petitioner moved for a dismissal, which motion was denied; at the conclusion of all the evidence, a peremptory instruction was presented and refused, and all exceptions required by law were duly taken. The jury found the petitioner guilty as charged and his punishment was fixed at eighteen years in the Mississippi State Penitentiary. The judgment

was entered accordingly. An appeal to the Supreme Court of Mississippi in *forma pauperis* was prosecuted and a stay of execution was had under Section 1175, Mississippi Code of 1942.

In the fourth assignment of error filed in the Supreme Court of Mississippi, the petitioner submitted that the Circuit Court of the First Judicial District of Hinds County, Mississippi had erred in allowing the alleged confession to be introduced in evidence because it had been extorted by duress, fear, threats and physical violence; and in point four of the original appellate brief, the petitioner urged that the admission of the alleged confession was in violation of the petitioner's right to equal protection and due process of law as guaranteed to the petitioner by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court considered the assignments of error, decided against the contention of the petitioner and affirmed the conviction with a written opinion (appearing on pages 30-32 of the transcript of record). A suggestion of error under the rules of practice and procedure in the Supreme Court of the State of Mississippi was duly and timely filed, the petitioner again presenting the question of his having been denied of the equal protection and due process of law guaranteed by the Fourteenth Amendment of the United States Constitution, and on April 14, 1947, the Supreme Court of Mississippi overruled the said suggestion of error and affirmed its former opinion with an opinion appearing on pages 33-35 of the transcript of record.

Thereby, the court of last resort in the State of Mississippi decided against the contention of the petitioner and held that the admission of the alleged confession was not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

4

The petitioner made a timely appeal in *forma pauperis* to the Supreme Court of the United States from the final decision of the Supreme Court of Mississippi, again urging that the admission of the alleged confession as evidence of guilt deprived the petitioner of due process of law; and on June 16, 1947, the Supreme Court of the United States dismissed said appeal, but treating the papers as a petition for writ of certiorari, granted certiorari and assigned the case for hearing.

Statement of the Case

The evidence offered by the State to establish the voluntary character of the petitioner's confession established the following facts: The petitioner, a seventeen year old negro boy, was arrested by the police of the City of Jackson, Mississippi at approximately midnight on the night of June 6, 1944 and shortly thereafter placed in the city jail (R. 3, 12). On the following afternoon, June 7, 1944, between two and three o'clock (R. 2, 7), the petitioner was taken from his cell into a small room six by eight feet, the door was closed (R. 5) and the petitioner was there questioned by two detectives, Captain Rogers and Officer McLeod, at least one of whom was armed (R. 5); and during part of the questioning other officers were present (R. 5). Before the questioning began, the petitioner was warned by Captain Rogers that anything he said could be used against him and that he (Captain Rogers) "wanted him to give me a free and voluntary statement as to what happened" (R. 7). The petitioner then allegedly made a detailed confession of the crime of assault with intent to rape. After the confession was completed, the officers requested that the petitioner sign the statement, and the petitioner stated: "I will sign it if you make me" (R. 3). The petitioner was then asked if he had been mistreated and he stated that he had been mistreated that morning (R. 3, 4, 8). No further attempt was made at that time to obtain

In view of the petitioner's statement that the jailer might have been present at the time the petitioner was struck and threatened, the court directed that the jailer, Mr. J. A. Young, be called as a witness. Mr. Young testified that the petitioner's face was familiar and that the petitioner had been in jail, but that he had no independent recollection of having seen the petitioner in jail other than that his face was familiar (R. 20). After testifying that the petitioner had never been struck in his presence (R. 20), Mr. Young was asked whether any person had ever been hit in his presence by the police officers and Mr. Young replied: "Not unmercifully, no sir" (R. 20). Mr. Young then qualified this statement by saying that the prisoners were struck only in self protection (R. 20, 21); but after being informed by the petitioner's attorney that by "struck" he meant hit with the fist or hands, Mr. Young testified that prisoners had been struck and slapped in his presence by the police officers (R. 21). Mr. Young further testified that the police officers could and often did question prisoners in the jail without his permission and when he was not present (R. 22). At the conclusion of this preliminary hearing, the court ruled that the confession was admissible (R. 26) and it was introduced by the State in its evidence in chief as evidence of the guilt of the petitioner in order to obtain a conviction. These were the only witnesses called and examined to determine whether the alleged confession had been voluntarily made or had been obtained as a result of force, coercion, violence and threats which would make its use as evidence of guilt, in order to obtain a confession, a denial of due process of law in contravention of the Fourteenth Amendment of the United States Constitution. Both of the detectives testified that they did not know what happened to the petitioner during the morning preceding the afternoon that the alleged confession was obtained. Both of the detectives testified that the petitioner stated to them on the

afternoon the alleged confession was made that he had been mistreated by police officers that morning; and both detectives testified that the petitioner stated in effect that he would sign the alleged confession if they made him. These were the two police officers who were called as witnesses to establish the voluntary character of the petitioner's alleged confession, and yet, Captain Rogers, the senior officer present at the time of the alleged confession, was sufficiently impressed by the petitioner's statements of prior duress occurring that morning that Officer McLeod testified that Captain Rogers said: "He wouldn't take a statement under those conditions from anybody," and Captain Rogers himself stated that after the petitioner referred to his mistreatment on the morning preceding the confession, that he immediately ceased questioning the petitioner and had him returned to his cell.

Thus the petitioner's statements of the prior duress, violence and threats are in no way disputed by the testimony of the two detectives, but is, in fact, corroborated by their testimony in that at the time the alleged confession was made these officers did not feel that they should take a statement at that time, one of the officers stating that: "He wouldn't take a statement under those conditions from anybody." (R. 5). And the officers immediately ceased questioning the petitioner and returned him to his cell. The testimony of these two officers did establish that they did not mistreat the petitioner and the petitioner himself testified that these two officers had been nice to him; but the petitioner's contention that he was struck and threatened by other officers approximately five hours prior to his alleged confession; which force, violence and threats frightened the petitioner, who was a seventeen year old negro boy, to the extent that any statements made by the petitioner were not free and voluntary statements is no way disputed by the Captain Rogers or Officer McLeod.

The only dispute in the testimony arises from the jailer's statements that the petitioner had not been struck by two officers in his presence, but the jailer also testified that the prisoners were at times struck by the police officers (R. 21) and that he had no independent recollection of the petitioner other than that the petitioner's face was familiar and that he had seen the petitioner in jail (R. 20). It should be noted, however, that on his direct examination, the petitioner had made no mention of the jailer being present at the time the petitioner was struck and threatened, and on cross-examination, the petitioner merely stated that: "I am pretty sure he was in there." However, the jailer was not questioned as to whether any threats were made towards the petitioner in his presence, and the Supreme Court of Mississippi in its decision overruling the petitioner's suggestion of error stated that the petitioner's testimony in regard to prior threats was wholly undisputed in the record.

In the original opinion by the Supreme Court of Mississippi, (*Lee v. State*, — Miss. —, 29 So. (2d) 211, 212), the court dismissed the petitioner's contention by saying:

"The conduct of the two detectives, if true, would of course be indefensible and would warrant and receive our condemnation. Yet the issue of fact and as well as credibility was for the trial judge upon such preliminary qualification, and we are not willing to disturb his conclusion. *Street v. State*, Miss., 26 So. (2d) 678."

The petitioner, in his suggestion of error filed in the Supreme Court of Mississippi, again presented and urged that the above and foregoing facts as established by the record of the proceedings in the trial court rendered the use of the petitioner's alleged confession as evidence of guilt to obtain a confession, a denial of due process of law.

The court, after considering the petitioner's contention, rendered its decision (*Lee v. State*, — Miss. —, 30 So. (2d) 74, 75) saying:

"There was no testimony to the effect that he was mistreated by officers McLeod and Rogers on the occasion when they took his statement down in writing. The trial judge was zealous in his effort to try to ascertain the truth as to whether or not this confession was made freely and voluntarily, and he caused the jailer to be called as a witness, whom the accused said was present at the time he was mistreated, and the jailer testified in substance that while he had no distinct recollection of the occasion, or whether he was even present at the time the interview was had, he was positive that no one had struck the accused on the occasion complained of or at any other time in his presence, although he admitted that sometimes prisoners were assaulted but 'not unmercifully.' However, he was not asked as to whether one of the two men who were said to have mistreated the prisoner made the statement to him that 'If you go downstairs and say you did not do it, it will be mighty bad for you.' Therefore the statement of the accused in that behalf is wholly undisputed in this record.

"However, the accused steadfastly testified, both upon the hearing before the trial judge in the absence of the jury and on the trial on the merits before the jury, that he did not in fact admit to officers McLeod and Rogers that he had committed the crime. That is to say, he denied having made to them a confession of the details about which they testified. Therefore, his contention here that the confession testified to by the officers was not made at all, and his contention that such confession was not freely and voluntarily made on account of the previous mistreatment accorded to him prior thereto, cannot both be true. As was said in the case of *Upshur v. Commonwealth*, 170 Va. 649, 197 S.E. 435, 437, 'If the defendant made no confession, it is

evident that neither fear nor favor moved him. If he did make the confession, it is equally clear that his testimony upon trial was false. The successive positions of the defendant are not only inconsistent with each other, but they are mutually contradictory. To sustain his subsequent contention, he asks us to disregard his evidence, and accept as true the evidence of the officers that a confession was made, but to refuse to accept their evidence that it was voluntarily made.'

"If the accused had not denied having made any confession at all, we would feel constrained to reverse the conviction herein because of the fact that his testimony as to the threat made to him during the forenoon by the plain clothes men is wholly undisputed, the jailer not having been asked about this threat, and having testified only that he was not struck by anyone in his presence after his arrest for this crime. But, we think that one accused of crime cannot be heard to say that he did not make a confession at all, and at the same time contend that an alleged confession was made under the inducement of fear. . . ."

It is upon the above and foregoing facts and the decisions of the Supreme Court of Mississippi that the petitioner presents his contentions that the use of the alleged confession as evidence of guilt to obtain a conviction in the trial court was a denial of due process of law; and that the decisions of the Supreme Court of Mississippi affirming such conviction also amount to a denial of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Assignment of Errors

The petitioner, in the following brief and argument, will urge that the proceedings in the trial court and in the Supreme Court of the State of Mississippi were erroneous and amounted to a denial of due process of law, as guaran-

teed by the Fourteenth Amendment of the United States Constitution in the following particulars, to-wit;

I

Under the facts disclosed in the printed transcript of record, the admission in evidence of the alleged confession, as evidence of the petitioner's guilt in order to obtain a conviction in the trial court, amounted to a denial of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution; and the action of the Supreme Court of Mississippi, in affirming such action of the lower court, amounted to a denial of due process of law, as guaranteed by the Fourteenth Amendment of the United States Constitution.

II

The decision of the Supreme Court of Mississippi in refusing to reverse the trial court for having allowed the alleged confession to be introduced as evidence of the petitioner's guilt in order to obtain his conviction, and in basing such refusal solely upon the ground that the petitioner had denied making the confession, is in itself a denial of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 91

ALBERT LEE,

Petitioner,

vs.

STATE OF MISSISSIPPI

Respondent

BRIEF AND ARGUMENT

May it please the Court:

POINT I

Under the Facts Disclosed in the Transcript of Record, the Admission in Evidence of the Alleged Confession as Evidence of the Petitioner's Guilt in Order to Obtain a Conviction in the Trial Court Amounted to a Denial of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

A. The Supreme Court of the United States is not precluded by the verdict of the jury or the decision of the highest state court from determining whether a confession, used as evidence of the accused's guilt, was obtained under such circumstances of coercion and duress as to make its use in evidence a denial of due process of law.

The decisions of the Supreme Court of the United States have established beyond controversy that the Supreme

Court will make an independent review of the circumstances under which a confession was obtained and determine whether the confession was obtained under such circumstances that would render its use in evidence a denial of the accused's constitutional right to due process of law; and such independent review is not precluded by the verdict of the jury nor the decision of the highest state court.

This question was presented to the court in *Ward v. State of Texas*, 316 U. S. 547, 86 L. Ed. 1663, 1665, 62 S. Ct. 1139, where it appeared that the Court of Criminal Appeals of Texas had refused to reverse the accused's conviction obtained by the use of a confession because the question of the admissibility of the confession was solely for the jury, and that the jury, after being properly instructed, had found against the accused's contentions. In reversing the Court of Criminal Appeals of Texas, the Supreme Court, speaking through Mr. Justice Byrnes, said:

"Each state has the right to prescribe the test governing the admissibility of a confession. In various states, there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant had been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process."

See also *Brown v. State of Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461.

In considering the same question in *Lisenba v. State of California*, 314 U. S. 219, 238, 86 L. Ed. 166, 180, 62 S. Ct. 280, the Court, speaking through Mr. Justice Roberts, said:

"The concept of due process would void a trial in which, by threats or promises in the presence of the court and jury, a defendant was induced to testify

against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence. As we have said, 'due process of law . . . commands that no such practice . . . shall send any accused to his death.'

"Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.

"There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case, we accept the determination of the trials of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.

"Here judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the test applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issues submitted was not *eo nomine*, one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury and

adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law."

And, in *Chambers v. State of Florida*, 309 U. S. 227, 228, 84 L. Ed. 716, 717, 60 S. Ct. 472, Mr. Justice Black, in rendering the Court's opinion, stated the question and the answer thereto as follows:

"The State of Florida challenges our jurisdiction to look behind the judgment below, claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined, because passed upon by a jury. However, use by a state of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioner's confessions were so obtained, by review of the facts upon which that issue necessarily turns."

See also *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032; *Ashcraft v. State of Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, 1196, 64 S. Ct. 921; and *Malinski v. State of New York*, 324 U. S. 401, 89 L. Ed. 1029, 1032.

Under these decisions, it is clear that the Supreme Court must make an independent examination of the facts disclosed by the transcript of record and determine from these facts whether the alleged confession, used as evidence of the petitioner's guilt in order to obtain a conviction in the trial court, was obtained under such circumstances as would render the admission of the confession in evidence a denial

of due process of law. Before reviewing the facts so disclosed by the record in the light of previous decisions of this Court, the petitioner would call to the Court's attention the following decisions in which the Supreme Court has had occasion to consider the meaning of the due process clause of the Fourteenth Amendment as applied to the use of confessions in order to obtain a conviction of a person accused of a crime.

B. The fundamental purpose of the due process clause as applied to criminal justice is to protect an accused person from unfair proceedings and an unfair conviction; and if a confession is obtained under circumstances that would not be condoned at the trial of the cause in the presence of the court and jury, then the use of the confession at the trial of the cause to obtain a conviction is a denial of due process of law.

The Supreme Court of the United States has, on numerous occasions, set forth its concept of the due process clause of the Fourteenth Amendment of the United States Constitution, specifically pointing out the rights guaranteed by this clause and the purpose to be affected by its enactment. For the sake of brevity, the petitioner would call to the Court's attention only those decisions discussing the purpose of the due process clause in cases in which the question of the purpose and construction of the clause was presented by an accused person who had been convicted by the use of an allegedly coerced confession.

In *Chambers v. State of Florida*, 309 U. S. 227, 235, 84 L. Ed. 716, 721, 60 S. Ct. 472, the Supreme Court, speaking through Mr. Justice Black, rendered a decision in which the purpose of the due process clause was discussed at length, saying:.

“The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our

constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments have immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and ad-horrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

See also *Adamson v. State of California*, 91 L. Ed. 1464, 1471, and *Brown v. State of Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461.

In *Lyons v. State of Oklahoma*, 322 U. S. 596, 605, 88 L. Ed. 1481, 1487, 64 S. Ct. 1208, the court, in discussing the purpose of the Fourteenth Amendment, stated:

"The Fourteenth Amendment is a protection against criminal trials in State Courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial. . . .'"

In *Lisenba v. State of California*, 314 U. S. 219, 236, 86 L. Ed. 166, 180, 62 S. Ct. 280, the court stated the rule as follows:

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession."

After setting forth the above quoted standard of due process as applied to criminal proceedings, Mr. Justice Roberts, speaking for the court, advanced the following test to determine whether the standard had been complied with, saying:

"To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra judicial confession which is used as evidence in the courtroom. . . ."

"A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the

trial is the inducing cause of the defendant's alleged confession.

"If by fraud, collusion, trickery and subordination of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices a confession is procured and used in the trial.

"The very concept of due process would void a trial in which by threats or promises in the presence of court and jury a defendant was induced to testify against himself. The case can stand no better if by resort to the same means, the defendant is induced to confess and his confession is given in evidence. . . ."

The same test was applied in the later decision of *Ashcraft v. State of Tennessee*, 322 U. S. 143, 154, 88 L. Ed. 1192, 1199, 64 S. Ct. 921, where the court said:

"We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep the defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open courtroom."

See also *Cooley*, Constitutional Limitations, 8th Edition (1927)-page 647 and *Wood v. United States*, 75 App. Dc. 274, 128 Fed. (2d) 265, 271, 141 A.L.R. 1318.

The foregoing decisions clearly establish the authority and duty of the Supreme Court to make an independent examination of the facts disclosed by the record to deter-

mine whether the petitioner has been convicted by a fair trial in which none of the petitioner's constitutional guaranties were abridged; and further establish that if the circumstances under which the alleged confession was obtained were such that would not be allowed in the presence of the court and jury at the trial of the action, then the use of a confession so obtained at the trial of the cause in order to obtain a conviction is a denial of the fundamental fairness of trial guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution.

C. The undisputed facts disclosed by the records, and the previous decisions of this court clearly establish that the petitioner has not had such a fair trial as is guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution.

In the following decisions, the Supreme Court of the United States has applied its concept of the guaranties of the due process clause of the Fourteenth Amendment to the facts disclosed by the records in such cases and determined whether the accused had received a trial and conviction which conformed to the requirements of the Fourteenth Amendment.

In *Brown v. State of Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461, the Supreme Court held that the petitioner had been denied due process of law in a case very similar to the facts disclosed by the record in the present case. The facts there disclosed were that the three petitioners had been seized on the night of the deceased's murder by enraged citizens who seriously whipped and otherwise mistreated the petitioners and had obtained a confession from each of the petitioners, which confessions were followed by a warning that if the petitioners changed their story in any respect from the confessions they had made, that they would receive the same treatment again. On the following

day, the petitioners were brought before the sheriff of Lauderdale County, the sheriff of Kemper County, a minister and several deputies, and after being warned of their rights and privileges, the petitioners made full and complete confessions, the latter confessions alone being introduced at the trial of the cause. (*Brown v. State*, 173 Miss. 542, 158 So. 339, 341). As to the voluntary character of the petitioner's second confessions, the Supreme Court of Mississippi had the following to say in regard to the facts disclosed by the record:

" . . . They admitted that Sheriff Adcock and his associates treated them kindly and promised to protect them from harm, and that the sheriff told them they did not have to talk, and that if they made any statement, they should tell only the truth about it. Two of them also admitted that during the progress of the trial, and just a short while before they took the witness stand, they had voluntarily told Sheriff Adcock that the confessions they had made to him on the previous Monday night were true."

Thus the alleged coercion of which the petitioners there complained of was inflicted prior to the time the confessions used at the trial were made; and at the time the confessions which were used in the trial were made, the petitioners admitted that they were treated kindly and informed that they need make no statement. In truth, therefore, the Supreme Court of the United States was presented with the same question which is here presented, that being whether the coercion inflicted prior to the time the confessions were made, so tainted the confessions admittedly peaceably obtained, as to render their use, in order to obtain a conviction, a denial of due process of law. In deciding this question, the Supreme Court said at page 687 of 80 L. Ed.:

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the con-

fession had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner"

In *Chambers v. State of Florida*, 309 U. S. 227, 241, 84 L. Ed. 716, 724, 60 S. Ct. 472, where it appeared that the confessions were obtained "from young negroes who were arrested without warrant and held in jail without formal charges and without being permitted to see or confer with counsel or friends, and who were in fear of mob violence, and who confessed only after five days of fruitless questioning; the court held the confessions involuntary so as to render their use, in order to obtain a conviction, a violation of due process of law, saying:

" . . . Due process of law, preserved for all by our constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our constitution—of whatever race, creed or persuasion."

In *Ward v. State of Texas*, 316 U. S. 547, 555, 86 L. Ed. 1663, 1667, 62 S. Ct. 1139, the undisputed evidence showed that the petitioner was arrested without a warrant by a sheriff of another county, that for three days he was driven from county to county, during which time he was continuously questioned by officers who told him of threatened mob violence, and finally made a confession which was used to obtain his conviction. The Supreme Court, in holding

that the use of the confession to obtain a conviction was a denial of due process of law, said:

"This court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protractive questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case."

In *Ashcraft v. State of Tennessee*, 322 U. S. 143, 154, 88 L. Ed. 1192, 1199, 64 S. Ct. 921, the sole grounds for holding the use of a confession to obtain a conviction in the trial court a denial of due process of law was that the evidence disclosed that the petitioner's confession was obtained near the end of a thirty-six hour period of practically continuous questioning under powerful lights by relays of officers, experienced investigators and highly trained lawyers. As to confessions obtained under such circumstances, the court said:

"We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open courtroom."

And in *Malinski v. State of New York*, 324 U. S. 401, 406, 89 L. Ed. 1029, 1033, a confession was held to have been coerced so as to make its introduction in evidence a denial of due process of law, where the petitioner upon being arrested was taken to a hotel room where he was stripped and not allowed to put on his clothes for several hours, and was not allowed to see a lawyer or friends other than one charged with participation in the crime, and after being so held from 8:00 a. m. to 6:00 p. m., he confessed although he was not subject to more than occasional questioning or anything more than his own apprehension that he might be beaten. In rendering the opinion, the court laid particular emphasis upon the prosecutor's argument to the jury, saying:

" . . . If that evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor placed it beyond doubt. For in his summation to the jury, he made certain statements which the court of appeals, said were 'indefensible' (292 N. Y. page 373, 55 N. E. (2d) 353) and which we think are sufficient to fill in any gaps on the record before us and to establish that this confession was not made voluntarily. He said that Malinski 'was not hard to break'; that 'he did not care what he did. He knew the cops were going to break him down.' And he added: 'Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacing.'

"If we take the prosecutor at his word, the confession of October 23 was the product of fear—one on which we would not permit a person to stand convicted for a crime."

Certainly the above quoted statements of the prosecuting attorney are no more indicative of the fact that the accused

confession was the product of fear, than the statement of Captain Rogers in the present case that "he wouldn't take a statement under those conditions from anybody." (R. 5), which statement was made by Captain Rogers after he had been informed of the petitioner's mistreatment, and at the time that the petitioner's allegedly voluntary confession was made.

Apparently the same question presented to the court in *Brown v. State of Mississippi, supra*, was again presented in *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032. There it appeared that prior to the time the confession was made, the petitioner was held in jail several days without charges filed against him and was on several nights taken out of the jail into the woods for questioning by armed officers, and later made a confession to the County Attorney, after being questioned from 11:00 p. m. to 3:00 a. m., during which period the officers who had taken the petitioner out to the woods for questioning were in the room. The petitioner made no contention that any coercion was used by the County Attorney or anyone else at the time the confession was made, and the court made no mention of any coercion at that time in its decision; and as in *Brown v. State of Mississippi, supra*, the court held that the introduction of this confession so obtained in order to obtain a conviction was a denial of due process of law.

In *Lyons v. State of Oklahoma*, 322 U. S. 596, 602, 88 L. Ed. 1481, 1485, 64 S. Ct. 1208, the Supreme Court held contrary to its previous decisions in *Brown v. State of Mississippi, supra*, and *White v. State of Texas, supra*, but the decision is readily distinguishable from the present case upon its facts. There the accused had made three confessions, the last two being admitted at the trial of the cause in order to obtain a conviction; the first confession was admittedly involuntary and there was no attempt to use it at the trial. The accused contended that the second confession

was tainted by the coercion affecting the first confession and that under such circumstances the use of the second confession was a denial of due process of law. The facts show that the first confession was obtained after a period of questioning which began at 6:30 in the evening and continued until the following morning between 2:00 and 4 o'clock, during which time a pan of the victim's bones was placed in the accused's lap. The evidence as to alleged physical abuse was in dispute. The second confession was made twelve hours later without any show of force or threats, after the accused had been transferred from the control of the sheriff to that of the warden of the State Penitentiary, with whom the accused was acquainted and from whom he had no reason to fear mistreatment. The third confession was made several days later to a prison guard, an acquaintance of the accused, under circumstances free from coercion. In a decision in which three of the judges dissented, the court held that the accused had not been denied due process of law, saying:

“ . . . Here improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressure, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing affect of the coercive practices which may fairly be drawn from the surrounding circumstances. *Lisenba v. California*, 314 U. S. 219, 240, 86 L. Ed. 166, 182, 62 S. Ct. 280. The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspect participation in a crime. *Ashcraft v. Tennessee*, 322 U. S. 143, 154, ante, 1192, 1199, 64 S. Ct. 921,

No. 391, October Term, 1943, decided May 1, 1944; *Hysler v. Florida*, 315 U. S. 411, 413, 86 L. Ed. 932, 934, 62 S. Ct. 688.

"When conceded facts exist, which are irreconcilable with such mental freedom, regardless of the contrary conclusion of the triers of fact, whether judge or jury, this court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the facts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses, but the legal duty is upon them to make the decision. *Lisenba v. California*, supra. (314 U. S. 238, 86 L. Ed. 180, 62 S. Ct. 280.)

.

"The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confession, under all possible circumstances. The admissibility of the latter confession depends upon the same test—is it voluntary. Of course, the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the latter confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process"

In deciding that the triers of fact were justified in holding that the prior coercion did not bring about the second con-

fession, the Supreme Court laid particular emphasis upon the following facts, which do not appear in the present case; these facts being that the coercion was inflicted twelve hours before the second confession was made, during which time the accused, who was twenty-one years of age, was removed from the sheriff's control in the county jail where the coercion had been inflicted and placed in the State Penitentiary where he was under the control of the warden, and having been a convict in the State Penitentiary, he was acquainted with the warden and had no reason to fear mistreatment from the warden, and finally the fact that several days later he made another admittedly voluntary confession to a prison guard with whom he was acquainted. If the accused said or intimated in any way that the second confession was made as a result of the prior coercion, that fact does not appear in the court's decision, and thus the holding that the prior coercion brought about the subsequent confession would of necessity have to be inferred solely from the facts of the prior coercion.

In the present case, the petitioner was a seventeen year old negro boy who had been arrested at approximately midnight on June 6, 1944 and placed in the city jail (R. 3); between 9:00 and 9:30 on the following morning, he was taken from his cell to the jailer's room where he was twice struck by one of two plain clothes officers and warned that "If you go downstairs and say you didn't do it, it will be mighty bad for you" (R. 13). On the same afternoon between 2:00 and 3 o'clock, the petitioner was taken from his cell to a downstairs room (R. 14) which room was approximately 6 by 8 feet in size (R. 5) where he was questioned by two detectives, at least one of whom was armed (R. 5); and after having been told by Captain Roger's that he, "Wanted him to give me a free and voluntary statement as to what happened" (R. 7). The petitioner then allegedly made a detailed confession. Upon being requested to sign

the confession, the petitioner stated that he would sign it if they made him (R. 3, 4) and then told the officers of his mistreatment by two officers during that morning (R. 3, 4, 8, 10, 15). After being so informed of the petitioners prior mistreatment, Captain Rogers said: "He wouldn't take a statement under those conditions from anybody" (R. 5); and the petitioner was returned to his cell without further questioning (R. 8, 10), but no attempt was made to discover the identity of the officers who had mistreated the petitioner (R. 8).

Under such facts, the petitioner respectfully submits that the present case is readily distinguishable upon its facts from *Lyons v. State of Oklahoma, supra*, in that at the time the alleged confession was made, the petitioner of his own volition brought to the interrogators' attention the fact that he had been mistreated and threatened that morning and stated that he would sign the confession if the officers made him do so. This statement alone, which was testified to by Officer McLeod, one of the interrogating officers, who was called by the state to establish the voluntary character of the confession, clearly establishes that the petitioner's confession was made in fear that further coercion would be inflicted, and that the threats made that morning would be carried out; and it is also obvious that the interrogating officers themselves did not feel that the petitioner's confession had been voluntarily made, for Captain Rogers, the other officer, called to establish the voluntary character of the confession, stated that he wouldn't take a statement under those conditions from anybody. With these facts in mind, the petitioner respectfully submits that the decision of the court in the present case should be ruled by *Brown v. State of Mississippi, supra*, rather than by *Lyons v. State of Oklahoma, supra*.

The petitioner's contention that his confession was made as a result of the threats and violence inflicted upon him

five hours previous to making his alleged confession is further strengthened by the benefit of a presumption of the continued influence of the coercion, to which presumption the defendant is entitled under the decisions of the Supreme Court of Mississippi. The general rule in regard to such a presumption is set out by the author in 22 *Corpus Juris Secundum* 1436, Section 817 (5), as follows:

"It is not necessary to prove, in the absence of suspicious circumstances, that, from the moment of the prisoner's arrest to that of his confession no inducement was offered or promise made. A confession will be received, if it was in fact voluntary, even though it appears that prior thereto and even after his arrest, accused had been threatened, or promises had been made, without success, for the purpose of procuring a confession; but it must appear that the confession was not made because of the inducements previously offered, as the influence of the promise or threat is presumed to continue it is shown to have been removed."

That Mississippi is in accord with this statement of the rule is obvious from a review of many decisions of the Supreme Court of Mississippi. In *Whitley v. State*, 78 Miss. 255, 28 So. 852, 853, 53 L. R. A. 402, where the evidence showed that the defendant's first confession was made upon a threat to deliver the defendant to a mob unless he confessed, a confession made by the defendant on the following day without any threats or violence was held to be presumptively involuntary, the court saying:

"... The second confession was made the next day after the first, and while the parties to whom it was made were in quest of circumstances to fortify the first one, and there is ground to suppose the influence first operating upon the defendant's mind was still affecting it. Where a confession is made under the influence of threats, such influence is presumed to

continue until removed by evidence, and a subsequent confession will not be received unless the influence of the first confession is shown to have been totally done away with by a warning of the consequences of a confession or by other means. 1 Greenl. Ed. Section 221; *Peter v. State*, 4 Smedes & M. 31; *Van Buren v. Same*, 24 Miss. 516; *Simon v. Same*, 37 Miss. 288. Reversed and remanded."

This decision has been followed and approved by the Supreme Court of Mississippi in the following cases: *Reason v. State*, 94 Miss. 290, 48 So. 820; *Banks v. State*, 93 Miss. 700, 47 So. 437; *Fischer v. State*, 145 Miss. 116, 110 So. 361; and in *Jones v. State*, 133 Miss. 684, 98 So. 150, 155, the court held that the mere fact that the defendant was warned that the confession could be used against him and that he did not have to make it was not sufficient to make the second confession admissible where it appeared that the defendant had been placed in fear of mob violence and urged to make the first confession which preceded the second confession by approximately one hour. The court, in its decision, said:

"In the case before us, the confession made and taken down by the county attorney followed within less than an hour the confession to the sheriff and detectives, and while the county attorney, with commendable fairness, sought to inform the accused that it was not necessary for him to repeat his confession unless he was willing to do so, and that it would be used against him, and that he had no inducements to offer, still we think this does not make it admissible. In the numerous cases that come here involving confessions, we frequently find confessions unlawfully obtained speedily followed up by a prosecuting officer or a justice of the peace by another one sought to be made competent by stating to the accused that he is under no obligation to make it, and it will be used against him, or that there is no obligation expressed or implied

to aid him in any respect. When a confession is unlawfully obtained, the influence which procured it to be so unlawfully obtained ought to be fully removed in order to make the second one admissible."

It is true that the Supreme Court of the United States, in its decision in *Lyons v. Oklahoma*, refused to consider the accused's contention that the earlier abuses rendered the subsequent confession presumptively involuntary, but as stated in that decision, and as has been pointed out above, there was evidence before the court and jury in that case, which if believed, abundantly supported the state's contention that the prior coercion did not bring about the second confession; and as previously stated, there was no mention in the decision that the accused said or in any way indicated that the second confession was made as a result of the prior coercion. However, in the present case, there is ample evidence in the testimony of the two officers who obtained the confession and who were called to establish the voluntary character of the confession to show that the confession here made was obtained as a result of coercion previously inflicted upon the petitioner; and the only evidence in any way tending to show that the prior coercion did not bring about the confession is the fact that the officers obtaining the confession treated the petitioner nicely and warned him of his rights, and the Supreme Court of Mississippi has held such facts do not justify the use of a confession made subsequently to the prior coercion. *Jones v. State, supra*.

The petitioner respectfully submits that under the foregoing decisions, there is ample undisputed testimony in the record to justify the Supreme Court in reversing the decision of the Supreme Court of Mississippi, affirming the conviction in the trial court. The most outstanding single fact in this regard is that the two officers who had obtained the confession and who were called to establish the voluntary character of the confession both testified that the accused

told them of being mistreated that morning (R. 3, 4, 8, 10); Captain Rogers then said that: "He couldn't take a statement under those conditions from anybody" (R. 5); yet this same officer was depended upon to establish the voluntary character of the confession at the trial. The officers further testified that the petitioner stated he would sign the confession if they made him (R. 3, 4) clearly establishing that the petitioner's statements had been made with the thought that a refusal to make them would result in further abuse. (See *Ward v. Texas*, 361 U. S. 457, 495, 86 L. Ed. 1663, 1667, where the court gave particular emphasis to a similar statement.) The testimony of these two officers does not dispute or put in conflict any way the petitioner's statement of prior duress, both of the officers stating that they had not seen the petitioner from the time of his arrest until the time that the confession was made (R. 3, 11). The sole remaining witness examined to determine whether the confession had been voluntarily made was the jailer, and from the jailer's testimony arises the sole dispute in the petitioner's testimony of prior duress and threats, if such a dispute can be said to exist at all. In the petitioner's direct examination, he made no mention of the jailer being present at the time he was struck and threatened, but on cross-examination, the petitioner did state: "I am pretty sure he was in there." (R. 16). The jailer testified that the petitioner had not been struck in his presence (R. 20) but also stated that the petitioner's face was familiar and that the petitioner had been in jail, but that he had no independent recollection of having seen the petitioner in jail other than that his face was familiar (R. 20). After testifying that the petitioner had never been struck in his presence, the jailer was asked whether any person had ever been hit in his presence by the police officers, and he replied: "Not unmercifully, no, sir." (R. 20). The jailer then qualified this statement

by saying that the prisoners were struck only in self protection (R. 20, 21); but after being informed by the petitioner's attorney that by "struck" he meant hit with the fist or hands, the jailer testified that prisoners had been struck and slapped in his presence by the police officers (R. 21). The jailer further testified that the police officers could and often did question prisoners in the jail without his permission and when he was not present (R. 22). The jailer was not questioned as to whether the accused had been threatened in his presence and, therefore, that statement of the petitioner is wholly undisputed in the record.

Taking this evidence of the three witnesses called by the state to establish the voluntary character of the alleged confession, in its most favorable light, it establishes nothing more than that the petitioner was warned of his rights prior to making the confession, that he was treated nicely by the officers who obtained the confession, and that the petitioner was not struck by two plain clothes officers in the presence of the jailer.

The petitioner respectfully submits that under this state of facts, clearly established by the record, that petitioner has not had such a fair trial as is guaranteed by the construction this court has set upon the Fourteenth Amendment to the United States Constitution in its previous decision; that the admission of the confession as evidence of the petitioner's guilt, in order to obtain a conviction in the trial, was a denial of due process of law; and that the decision of the Supreme Court of Mississippi in affirming the conviction obtained in the trial court is also a denial of due process of law. *Brown v. State of Mississippi, supra.*

The petitioner would further call to the Court's attention that throughout his petition for appeal, he advanced the contention that there was no evidence apart from the confession sufficient to sustain the petitioner's conviction. The

petitioner again asserts this contention and does not anticipate a denial of said contention by the Attorney General of the State of Mississippi, as counsel for the respondent herein; but in the event that such a denial is made, the petitioner would call to the Court's attention that even though the petitioner has failed to have the entire record printed so that the fact that there was no evidence outside the confession sufficient to sustain his conviction might be presented to the Supreme Court, that this omission does not preclude the duty of the Supreme Court to reverse the petitioner's conviction and the decision of the Supreme Court of Mississippi affirming the conviction in the event that the confession is held to have been improperly admitted in evidence; for it is well settled that in the event a coerced confession is used as evidence of the accused's guilt, the judgment of conviction will be set aside even though the evidence apart from the confession was sufficient to sustain the conviction. *Malinski v. State of New York*, 324 U. S. 401, 404, 89 L. Ed. 1029, 1032.

POINT II

The Decision of the Supreme Court of Mississippi in Refusing to Reverse the Trial Court for Having Allowed the Alleged Confession to Be Introduced as Evidence of the Petitioner's Guilt in Order to Obtain His Conviction; and in Basing Such Refusal Solely Upon the Ground That the Petitioner Had Denied Making the Confession, Is in Itself a Denial of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

The Supreme Court of Mississippi, in its opinion overruling the petitioner's suggestion of error, *Lee v. State*, — Miss. —, 30 So. (2d) 74, 75, said:

“If the accused had not denied having made any confession at all, we would feel constrained to reverse

the conviction herein because of the fact that his testimony as to the threat made to him during the forenoon by the plain clothes men is wholly undisputed, the jailer not having been asked about this threat, and having testified only that he was not struck by anyone in his presence after his arrest for this crime. But, we think that one accused of crime cannot be heard to say that he did not make a confession at all, and at the same time contend that an alleged confession was made under the inducement of fear. We do not mean by this to say that one who claims to have been acting under fear when he makes statements which involve his guilt of crime cannot be heard to dispute that *some* of the statements embodied in an alleged confession were not actually made as disclosed by a written statement which he may or may not have signed; or as testified to by the officers as having been orally made, but we limit this holding to a case where an accused denies having made any statements in an alleged confession, and at the same time contends that he was acting under fear when he made them."

It is obvious from this decision that the court considered the fact of the prior duress and the fact that the petitioner's statements were made as a result of such duress to have been sufficiently established by the record to warrant and demand a reversal of the petitioner's conviction. However, the court refused to so reverse the petitioner's conviction upon the sole ground that the petitioner had denied making any confession, and the petitioner respectfully submits that under the decisions of the Supreme Court of the United States, such a holding in and of itself amounts to a denial of due process of law.

In *White v. State of Texas*, 310 U. S. 530, 531, 84 L. Ed. 1342, 1344, 60 S. Ct. 1032, counsel for the State of Texas requested of the court a holding such as that rendered in this cause by the Supreme Court of Mississippi. The

Supreme Court of the United States, speaking through Mr. Justice Black, refused to so hold, saying:

"The State suggests that there is evidence that petitioner denied ever having made or signed the confession which purported to be signed by his mark. Therefore, it insists that petitioner is barred from urging that the prosecution's use of the confession could have deprived him of due process at his trial. But regardless of petitioner's testimony on this question, the State insisted and offered testimony to establish that the confession was signed by him, and upon this evidence, the confession was submitted to the jury for the purpose of obtaining his conviction. Since, therefore, the confession was presented by the State to the jury as that of the petitioner, we must determine whether the record shows that, if signed at all, the confession was obtained and used in such manner that petitioner's trial fell short of that procedural due process guaranteed by the constitution."

See also *Ashcraft v. State of Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921, where the petitioner denied having made the confession and the court reversed his conviction without discussing the question here involved.

The petitioner would call to the Court's attention that the Supreme Court of Mississippi, in rendering this decision, based the decision upon and cited as authority therefor the case of *Upshaw v. Commonwealth*, 170 Va. 649, 197 S. E. 435, 437, which the petitioner submits is distinguishable upon its facts. The facts there showed that the defendant was convicted of unlawfully manufacturing ardent spirits and after his motion to set aside the verdict had been overruled, he appealed, assigning as error the lower court's action in admitting an alleged confession in evidence. On trial, the defendant's only objection to the admission of the confession was that he had made no confession; but on appeal, the defendant attempted to advance the contention

that a confession had been made, but that it had been made under duress. The appellate court refused to sustain the defendant's contention on appeal because the inconsistency of his contention on appeal was apparent from the record, which showed that the defendant had made no contention at the trial of the cause that the alleged confession was involuntary, and there was no evidence in the record to indicate that it was involuntary. It was in regard to this inconsistency that the court was speaking when it stated the rule upon which the Supreme Court of Mississippi based its refusal to reverse the petitioner's conviction in the present case. That such was the true holding of the court is apparent from the syllabus which states:

"The Supreme Court of Appeals cannot disregard defendant's evidence before a trial court that he never made confession and accept as true officer's evidence that confession was made, but refused to accept their evidence that it was voluntary, on appeal from judgment on verdict of conviction, as question before jury was whether confession was made, not whether it was voluntary."

The inconsistency in *Upshaw v. Commonwealth, supra*, was in the successive positions the defendant took in the trial of the cause and on appeal. The petitioner respectfully submits that in the present case, there is no inconsistency in the contentions he advanced in the trial court. *Blacks Law Dictionary*, 3rd Edition (1933) page 945, defines inconsistency, citing many authorities therefor, as follows:

"Mutually repugnant or contradictory; contrary; the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other; as, in speaking of 'inconsistent defenses,' or the repeal by a statute of 'all laws inconsistent herewith' . . ."

At no point in the proceedings in the trial court did the petitioner deny that he made certain statements to Captain Rogers and Officer McLeod on the afternoon that he allegedly made the confession. In regard to his statements to these officers, the petitioner testified: "He was asking me some questions. I don't know what all he asked and all I said, but I didn't admit I did it" (R. 17). If the petitioner had denied even talking to these officers and then advanced the contention that he had confessed or made statements as a result of the prior coercion, the petitioner's contentions would be inconsistent; but under the facts of the present case, the petitioner's contention is nothing more than that although he did make some statements to the officers, the statements did not amount to a confession, and that whatever statements were made, were made as a result of the prior duress, and there is obviously no inconsistency in such a contention. The only inconsistency in the present case is between the officer's testimony that the petitioner confessed, and the petitioner's testimony that he did not confess, and certainly that is not sufficient to justify a refusal to reverse the conviction of an accused person obtained by the use of a confession, which, if made, was admittedly made as a result of coercion and duress. However, the decision of the Supreme Court of Mississippi in effect so holds, for the court found that the evidence of prior coercion was sufficiently established to warrant a reversal of the petitioner's conviction, but refused to reverse the conviction because there was a dispute between the testimony of the officers and the testimony of the petitioner as to whether the petitioner's statements had amounted to a confession.

As has been pointed out previously in this brief and argument, the purpose of the due process clause, as applied to criminal justice, is to assure to every accused the right

to a fair trial. The Supreme Court of Mississippi in its decision has in effect laid down a rule which precludes the court from inquiring into the voluntary character of a confession which is introduced as evidence of the accused's guilt, if the accused denies that he made the confession; and even though the record sufficiently establishes that if the confession was in fact made, it was made under duress.

The petitioner submits that under the decision of this Court in *White v. State of Texas, supra*, that where a State uses a confession allegedly made by the accused as evidence of his guilt in order to obtain a conviction, that even though the accused may deny the confession was made, it is incumbent upon the State to establish the voluntary character of the confession in order to assure the accused of that fairness of trial guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution.

Petitioner would also call to the Court's attention that the decision of the Supreme Court of Mississippi condones the use of a confession known by the prosecuting officers to be a result of coercion to be used at the trial to obtain a conviction of the accused; which petitioner submits has been held by this Court, in its previous decisions, to be a denial of due process of law. In *Mooney v. Holohan*, 294 U. S. 103, 112, 79 L. Ed. 791, 794, 55 S. Ct. 340, the Supreme Court held that the constitutional requirement of due process was not satisfied where a conviction was obtained by the presentation of testimony known by the prosecuting officers to be false, saying:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen

against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Herbert vs. Louisiana*, 272 U. S. 312, 316, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial, which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute State action within the purview of the Fourteenth Amendment. That amendment covers any action of a State, 'whether through its legislature, through its court, or through its executive or administrative officers.' *Carter vs. Texas*, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; *Rogers vs. Alabama*, 192, U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; *Chicago, B. & Q. R. Company vs. Chicago*, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581."

See also *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; and *Powell v. State of Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527.

And in *Brown v. State of Mississippi*, 297 U. S. 278, 287, 80 L. Ed. 682, 687, 56 S. Ct. 461, where the Supreme Court of Mississippi had held that a confession known to be a result of coercion was properly used to obtain a conviction where the accused's attorneys failed to move that the confession be excluded after the involuntary character of the confession had been established, the Supreme Court of the United States reversed the decision of the Supreme

Court of Mississippi; and in reversing, held that the decision of the Supreme Court of Mississippi amounted to a denial of due process of law, saying:

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney vs. Hotohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406, *supra*. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the Federal question thus presented, but declined to enforce petitioner's constitutional right. The court thus denied a Federal right fully established and specially set up and claimed, and the judgment must be reversed."

With these authorities in mind, the petitioner respectfully submits that the decision of the Supreme Court of Mississippi, allowing the use of the petitioner's confession as evidence of his guilt, in order to obtain a conviction, where the confession was known to have been a result of coercion, is a denial of due process of law, and that the decision of the Supreme Court of Mississippi affirming the petitioner's conviction in the trial court should, therefore, be reversed.

Conclusion

Under the facts disclosed by the record and the authorities hereinbefore cited, the petitioner respectfully submits that he has been denied that fairness of trial guaranteed to an accused by the Fourteenth Amendment of the United States

Constitution, and that he has been denied of his liberty without due process of law.

Wherefore, petitioner prays that the decision of the Supreme Court of Mississippi affirming petitioner's conviction in the trial court be reversed, and that judgment be rendered in favor of the petitioner, or if mistaken in this, that the cause be remanded and the petitioner accorded a new trial.

Respectfully submitted,

ALBERT LEE,
By FORREST B. JACKSON,
Of Counsel.

FORREST B. JACKSON,
Century Building,
Jackson, Mississippi,
Of Counsel.

I, Forrest B. Jackson, of counsel for the petitioner in the above and foregoing matter, hereby certify that I have this day delivered a true and correct copy of the above and foregoing brief for petitioner to the Honorable Greek L. Rice, Attorney General for the State of Mississippi, counsel for the respondent herein, by personal delivery to him in his office in the New Capitol Building, Jackson, Mississippi.

This the 9th day of September, A. D., 1947.

FORREST B. JACKSON,
Of Counsel for Petitioner.